

APPEAL NO. 022838
FILED DECEMBER 30, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on October 17, 2002. With respect to the issues before him, the hearing officer determined that the respondent (claimant) "did not sustain a compensable repetitive trauma injury, or a compensable injury of any other type, at any relevant time"; that the date the claimant knew or should have known her disease may be related to her employment was _____; that the appellant (carrier) was not relieved of liability under Section 409.002 because the claimant timely notified her employer pursuant to Section 409.001; that the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021; that the claimant "did sustain an injury, though not compensable as it was not work related;" and that the claimant has not had disability as a result of her injury. The carrier appealed only the determination that it waived its right to contest the compensability of the claimed injury under Section 409.021, arguing that it acted in compliance with the statutory provision, as the hearing officer found the claimant not entitled to income benefits. The claimant did not file a response.

DECISION

Affirmed, as reformed.

Neither party appealed the hearing officer's determinations that the claimant did not sustain a compensable repetitive trauma injury, or a compensable injury of any other type, at any relevant time; that the date the claimant knew or should have known her disease may be related to her employment was _____; that the carrier was not relieved of liability under Section 409.002 because the claimant timely notified her employer pursuant to Section 409.001; that the claimant did sustain an injury, though it was not compensable as it was not work-related; and that the claimant has not had disability as a result of her injury.

We note that the repetitive trauma injury has become compensable by operation of law because of the carrier's waiver. Therefore, the hearing officer's determinations of the compensability of the repetitive trauma injury are incorrect as a matter of law. We reform the hearing officer's determinations that the claimant did not sustain a compensable repetitive trauma injury to indicate that the claimant did sustain an injury as found in Conclusion of Law No. 8. We further reform Conclusion of Law No. 8 to omit the phrase "although it was not a compensable injury," as that conclusion is incorrect as a matter of law, due to the carrier's waiver.

Section 409.021(a) reads, in pertinent part,

- (a) An insurance carrier shall initiate compensation under this subtitle promptly. Not later than the seventh day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall:
 - (1) begin the payment of benefits as required by this subtitle; or
 - (2) notify the commission and the employee in writing of its refusal to pay.

. . .

With regard to the waiver issue, the Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) reflects that the carrier first received written notice of the claimant's claimed back injury on May 3, 2002. The TWCC-21 is date-stamped May 13, 2002, and in it the carrier disputes that the claimant sustained an injury in the course and scope of employment, gave timely notice of injury, or has disability, and asserts that the claimant suffers from an ordinary disease of life or a preexisting condition and did not sustain a compensable injury. The hearing officer found that the carrier first received written notice of the claimed injury on May 3, 2002, and that the carrier failed to prove that it disputed the claimed injury within seven days of May 3, 2002. The hearing officer concluded that the carrier waived its right to contest the compensability of the claimed injury by not timely contesting an injury in accordance with Section 409.021. The hearing officer appropriately followed the decision set out in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002).

Since the carrier received written notice of the claimed injury on May 3, 2002, and its TWCC-21 disputing compensability is dated May 13, 2002, it did not contest compensability within seven days of its first receipt of written notice of injury. Also, there is no evidence that the carrier agreed to initiate benefits, or that it initiated benefits, within seven days of May 3, 2002.

In the Downs case, the Texas Supreme Court determined that under Sections 409.021 and 409.022, a carrier that fails to begin benefit payments as required by the 1989 Act or send a notice of refusal to pay within seven days after it receives written notice of injury has not met the statutory requisite to later contest compensability. On August 30, 2002, the Texas Supreme Court denied the motion for rehearing in the Downs case. Thus, the Downs decision, along with the requirement to adhere to the seven day "pay or dispute" provision of Section 409.021(a), became final. Texas Workers' Compensation Commission Appeal No. 021944-s, decided September 11, 2002.

In the instant case, the claimant claimed a repetitive trauma injury to her left elbow and back from performing a work activity. The hearing officer found that the claimant was not injured in the course and scope of her employment; he did not find that the claimant has no injury. In fact, the hearing officer made a finding of fact that the claimant was injured, which was not appealed.

Since the carrier did not agree to initiate benefits, or dispute compensability within seven days after its received written notice of injury, it did not meet the statutory requisite of Section 409.021(a) to later contest compensability. The claimant's injury has thus become compensable as a matter of law, and the hearing officer did not err in determining that the carrier was liable for benefits payable to the claimant.

The decision and order of the hearing officer are affirmed as reformed.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge